No. 285.

Brief of Bissell for D. C.

Supreme Court of the United States

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OCTOBER TERM, 1898.

GEORGE M. ISRAEL,

Plaintiff in Error,

vs.

CHARLES P. GALE, as Receiver of The Elmira National Bank (substituted for Charles Davis, as Receiver, etc.)

Defendant in Error.

No. 285.

Brief for the Defendant in Error.

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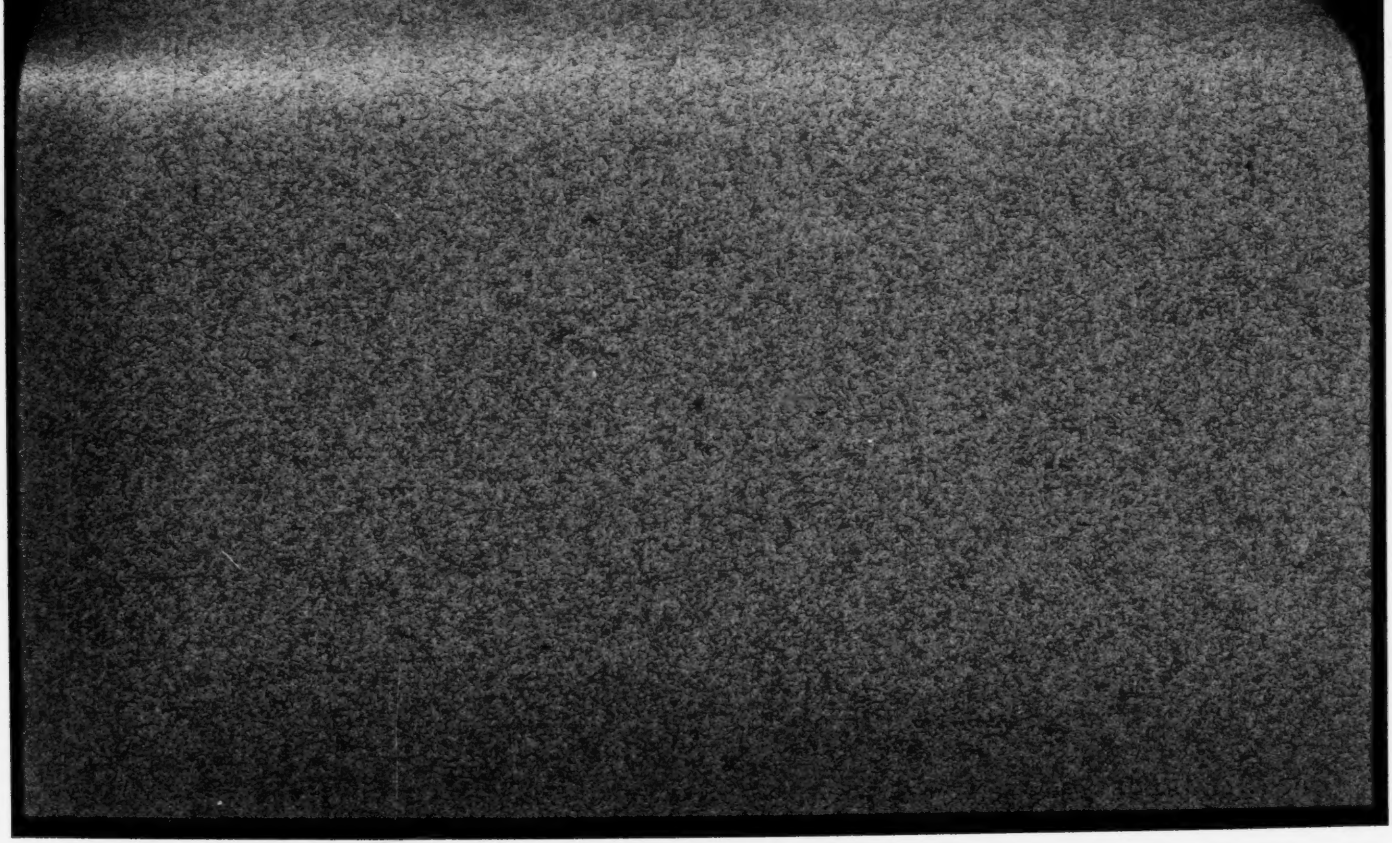

United States Supreme Court.

OCTOBER TERM, 1898.

GEORGE M. ISRAEL,
Plaintiff in Error,

vs.

CHARLES F. GALE, as Receiver of the ELMIRA NATIONAL BANK, (substituted for CHARLES DAVIS, as Receiver, etc.),
Defendant in Error.

Brief for Defendant in Error.

(The references are to the printed pages of the Transcript of Record.)

STATEMENT OF FACT.

The unsatisfactory character of the statement of fact contained in the brief for the plaintiff in error, and the unwarranted deductions from the evidence therein contained, would seem to render it appropriate for the defendant in error to make what seems to him a more accurate statement of the case.

The defendant below, George M. Israel, of New York City, at the request of one David C. Robinson, of Elmira, N. Y., made and delivered to Rob-

inson the promissory note in question (pages 10 and 11, Transcript of Record).

On the fourth day of May, 1893, the note was presented at the Elmira National Bank by Robinson, and at his request was discounted by the cashier, and the proceeds placed to his credit (pp. 14, 18, 19, 20 and 25).

Robinson, at that time, was a director of the bank, a very prominent and reputable citizen of Elmira, engaged in many large and important enterprises, and reputed and believed to be a man of great wealth and financial responsibility (pp. 11, 14, 25 and 26).

When the paper was presented to the cashier he was informed by Robinson that the makers "were able to pay the notes" (p. 20), and at the same time was shown a letter by Robinson, which created the impression upon him that the notes had come from I. B. Newcombe & Co., a firm of reputable and responsible bankers of New York, with whom the cashier knew Robinson to have had previous dealings (pp. 10, 21 and 23).

As a matter of fact, it transpired on the trial that the maker of the note, George M. Israel, was at the time a typewriter in the office of I. B. Newcombe & Co., and was not then, nor is he now, a man of any property or financial responsibility (p. 10). Of which, however, neither the cashier nor the bank had any knowledge (pp. 20, 21, 23 and 24).

Robinson was very prominent, a leading member of the bar, a director in the bank, believed to be a very rich man of high personal character, was Mayor of the City at the time, President of the

STATEMENT OF FACT.

Elmira Municipal Improvement Company, which owned everything in the way of public improvements in and about the City, including the water works, electric lighting plant, etc., etc., and was necessarily using large sums of money (pp. 11, 14, 25, 26 and 27); and when the notes in question were presented, they were discounted and placed to Robinson's credit, by the cashier, just as he would have done in the case of any other equally reputable and responsible customer (p. 25), and just as had frequently been done before (p. 25), and pursuant to the general instructions received from the officers of the bank (pp. 23, 24 and 25).

Subsequently, and on or about the 23d day of May, 1893, the Elmira National Bank failed (p. 18) and the predecessor of the present receiver was appointed receiver by the Comptroller of the Currency, and finding this note among the assets of the bank, brought this action to recover thereon (pp. 2, 3 and 4).

The answer sets up as defenses substantially:

1st. That the defendant received no consideration for the note (p. 6).

2d. That it was applied in payment of an antecedent indebtedness to the bank arising out of an overdraft (p. 7).

3d. That it was a mere subterfuge for the obtaining of money from the bank contrary to the limit prescribed by law (p. 7).

4th. That the maker was merely a straw man of no financial responsibility, and expected Robinson to take care of the note himself (p. 7).

STATEMENT OF FACT.

5th. "That he had no knowledge, at the time he delivered said note to said Robinson as aforesaid, *how said note was to be used by said Robinson*," but "*believed* that said Robinson would make said note good and of value, either by securing a good endorsement to the same, or by depositing good collateral therewith, in case said note was used at all by said Robinson" (pp. 7 and 8).

6th. That the bank had guilty knowledge of all the facts alleged.

Upon the trial, the defendant testified: "I had a conversation with D. C. Robinson, at the time of the making of the note. He stated to me the object or purpose for which he desired the note. *He stated to me that he desired some accommodation notes and he wanted us clerks to make them, and stated the amonnt. He said that the reason he wanted the accommodation notes was that he had exceeded his line of discount and could not get any more accommodation;* that he was building a power house up there (in Elmira) and needed some money to accomplish that purpose, and if we would give him these notes it would enable him to accomplish that; he also added that we would not be put in any position of paying them at any time; that he would take care of them and gave us positive assurance on that point, and, naturally knowing the man and thinking that he was a millionaire, as he probably was at that time, we had no hesitation about going on the notes. He said it would simply be a temporary matter. At the time I gave the note in suit, other notes were given by Mollenhauer and Roll, who were with me, clerks in the office of I. B. Newcombe & Co."

STATEMENT OF FACT.

Upon this testimony there was a further claim that the note had been diverted from its original purpose, and that having been applied to the payment of an antecedent indebtedness, the plaintiff not being a holder for value, could not recover.

The "antecedent indebtedness," upon which great stress is laid by the plaintiff in error, was an overdraft which, at the close of business on the night of May 4, 1893, appeared by the books of the bank to amount to about $35,000 (p. 20).

At times prior to that date, the books showed overdrafts of a larger amount, but the correctness of the amount was a matter of dispute between the bank and Robinson, who claimed that certain large items had been improperly charged to his account (pp. 20 and 21). As to which was right in this dispute the testimony does not disclose.

The plaintiff in error insists that the proceeds of the note in suit and the others given at the same time, amounting in all to $54,000, were applied to the payment of the overdraft in question; but this claim not only has no evidence to support it, but is in direct conflict with the only testimony in the case upon the question of the application of the proceeds of the notes referred to.

Upon this point the only testimony is that of Robinson at the bottom of page 26, where he says: "The amount of *other* notes wiped out the overdraft and made a balance," and that of Edson the book-keeper at page 28, where he says: "There were items coming through the exchanges that amounted to about $73,000, and there was a deposit made of $33,000 to make the overdraft good.

STATEMENT OF FACT.

These were to take up the items that came through the exchanges."

These notes were therefore duly and regularly discounted, the proceeds in cash placed to the credit of Robinson in the usual manner, and were paid out by the bank in cash upon such new items as were presented in the usual course of business.

At the close of the testimony, the plaintiff below made a motion for a direction of verdict for the full amount of the note with interest, which was granted.

The conclusions stated in the "summary of facts," set forth on pages 9, 10 and 11 of the brief for the plaintiff in error, and alleged to have been adduced from the undisputed evidence given upon the trial, are, with one or two immaterial exceptions, utterly unwarranted and without support in the evidence. This will conclusively appear by even a casual examination of those portions of the testimony referred to in the brief to support the conclusions therein enumerated. In order, therefore, that the defendant in error may not be thought to have acquiesced in the correctness of the conclusions in question, the following

SUMMARY OF FACTS.

is believed to more accurately state the conclusions properly deducible from the evidence in the case.

1. The note in suit was payable to the order of the Elmira National Bank and was without endorsement (p. 3).

2. The said note was made and delivered by the maker to Robinson without consideration, of

which, however, the bank had no knowledge, but was delivered by Robinson to the bank for full and adequate consideration (pp. 21, 26 and 28).

3. The said note was made and delivered to Robinson to enable him to procure further accommodation at the bank, but was otherwise without restriction (pp. 10 and 11).

4. The said note was used for the purpose for which it was given (pp. 20, 26 and 29).

5. The total deposits made May 4, 1893, were upwards of $112,000, leaving a balance of about $4,000 to Robinson's credit after paying up the overdraft and all new items that came through the exchanges during the day (p. 28).

6. The said note was discounted in the usual course of business at the request of Robinson, who at that time was a very prominent and influential citizen of Elmira, and believed to be a man of great wealth and integrity, and upon his assurance that the maker was responsible and able to pay (pp. 20 and 25).

7. The bank parted with full value upon receiving said note, and placed the proceeds thereof in cash to the credit of said Robinson upon the books of the bank (pp. 20, 26 and 29).

8. At the time the bank took said note, inquiry was made of Robinson as to the maker, and assurances were received from him as to his responsibility (pp. 20, 21, 23 and 25.

9. The maker knew whether he had received any consideration from Robinson, and he knew

where the note was to be used; the bank did not know that no consideration had passed from Robinson to the maker; and in the absence of any notice from the maker, when the note was presented by a man of Robinson's wealth and standing, the bank had a right to assume that the maker, before the delivery to Robinson had received value for the note and to act upon that assumption (pp. 10, 11, 20, 21, 23, 24 and 25).

10. At the time the bank discounted said note, Robinson had procured to be discounted other paper amounting to about $300,000 and paper to the amount of about $107,000 had been discounted for the benefit of members of the family of the cashier, all of which paper, without exception, so far as the testimony discloses, was gilt edged commercial paper, upon which the bank never lost a single dollar (pp. 27 and 28).

11. Robinson, while he was a director of the bank, occupied no other official relation toward it; was not a member of the finance committee; did not have charge of any particular branch of the business, and neither had nor exercised any control over the policy of the bank, other than as a member of the board of directors, and in the transaction in question, acted entirely for himself and his own individual interests, and in no particular for the bank (pp. 12, 14, 25 and 26).

POINTS.

I.

The evidence presented no question requiring the submission of the case to the jury.

An examination of the New York authorities rather than the testimony in this case is evidently responsible for the erroneous theory of the learned counsel for the plaintiff in error that the note, being accommodation paper, was given by the maker for a specific purpose, from which it was diverted, and applied to the payment of an antecedent indebtedness.

Having adopted this rule of law, its application was only possible by assuming a state of facts having no support in the evidence.

(a) **The note was not diverted.**

From the testimony of the plaintiff in error may be adduced his own theory as to the purpose for which the note was given.

At the bottom of page 10, he testifies as follows;

"He stated to me that he desired some accommodation notes and he wanted us clerks to make them, and stated the amount. He said that the reason he wanted the accommodation notes was *that he had exceeded his line of discount and could not get any more accommodation;* that he was building a power house up there (in Elmira) and needed some money to accomplish that purpose, and if we would give him these notes, it would enable him to accomplish that." This testimony is not subject to the narrow construction sought to be placed upon it by the

POINTS.

1. The evidence presented no question requiring the submission of the case to the jury.

(*a.*) *The note was not diverted.*

plaintiff in error. Robinson told him that he had *exceeded* his line of discount, and could not get any more *accommodation*. What he wanted was further accommodation. The method of accomplishing his purpose was not explained, nor did the maker require any explanation, or care what method was pursued. If any doubt of this existed, it would be dispelled by the statement contained in the amended answer, on page 7 of the printed Transcript of Record, as follows: "The defendant alleges that he had no knowledge at the time he delivered said notes to said Robinson as aforesaid, *how said note was to be used by said Robinson.*" Israel had no intention of conveying the impression in his testimony that the specific proceeds of the note were to be applied to the building of the power house, and does not say so; and the most that can be deduced from his evidence in favor of his counsel's theory, is that Robinson was at liberty to use the notes, either for the purpose of paying up his overdraft, or in any other way that would result in further accommodation to him at the bank, through which he might procure additional funds. It certainly cannot be contended that it was the duty of the bank to see to it that such additional fund as might result from the transaction, should be applied to the building of the power house, or any other specific purpose; and yet the effect of the position assumed by the plaintiff in error, is that it was the

POINTS.

1. The evidence presented no question requiring the submission of the case to the jury.

(*a.*) *The note was not diverted.*

bank's duty whenever a check was drawn against the fund, to inquire the purpose for which the check was given, before honoring it. "If we would give him these notes, it would enable him to accomplish that;" that is, having exhausted his line of discount at the bank, and being indebted to the bank, he was unable to raise further funds for any purpose, and if they would give him these notes it would enable him, not necessarily to create a fund to be exclusively devoted to the building of the power house, but, to pay up his overdraft, or other indebtedness to the bank, or otherwise place himself in such a position with the bank that it would be willing to extend to him further accommodations. The payment of his antecedent indebtedness to the bank, so as to entitle him to new accommodations, the proceeds of which might be used in the building of the power house would just as conclusively meet even the technical construction contended for by the counsel for the plaintiff in error, as if an entirely new fund had been created to be specifically applied to that purpose.

Israel had no conceivable motive for restricting the note as contended for by his counsel. He had no interest in the power house; he was a person of absolutely no financial responsibility; did not expect to be called upon to pay the note, but expected Robinson, whom he believed to be a millionaire, to take care of it at the proper time, and he was

POINTS.

1. The evidence presented no question requiring the submission of the case to the jury.

(a.) The note was not diverted.

therefore in no wise interested in the purpose to which the note was to be put or how it was to be used. He knew nothing could be collected from him, and rather prides himself on that fact.

His counsel, recognizing how absurd would appear the claim that Israel had carefully restricted the purpose of the note, in the absence of any possible motive for so doing, couples the statement of the purpose with the further statement to be found at page 10 of his brief, subdivision 3 of his summary of facts, as follows: "Presumably for the benefit of the properties in which the maker's employers were interested." This latter is a mere insinuation without a shadow of support in the evidence. Pages 10, 11 and 23 are referred to in support of this statement. Pages 10 and 11, which are Israel's own testimony, do not contain a word on this subject. Page 23, which is a part of the cashier's testimony, contains nothing from which any such inference can be drawn. Bush testified that I. B. Newcombe & Co. and Robinson "had had dealings in the past in the transfer of this property," and had been "interested with one another," and explains, on the same page, that their relations were merely those of broker and client, and says that they had no other transactions for some time. This same unwarranted statement is persisted in on page 4 of the brief for the plaintiff in error, and seems to be persistently and delib-

POINTS.

1. The evidence presented no question requiring the submission of the case to the jury.

(a.) The note was not diverted.

erately made for the purpose of creating the impression that Israel was unwilling to give Robinson the benefit of his financial standing and responsibility, except upon the condition that the proceeds of his note were to go into a building in which the faithful servant's employers were financially interested. Israel, himself, did not know they were interested, does not even hint that he ever suspected such a thing, or cared whether they were or not, or that he was actuated in the slightest degree by any such motive. The evident purpose in this attempt to wrest the testimony from its plain meaning, is to bolster up the fanciful theory that the note was given for a specific purpose, from which it was diverted, and is a mere perversion of the facts to fit certain New York authorities which would otherwise have no possible application. He knew from what was told him that Robinson was indebted to the bank; he made the note directly to the bank, and, therefore, knew it was to be used at that bank. He knew that the reason Robinson could not get further accommodation was because he was indebted to the bank, and that the existing indebtedness would have to be paid before new accommodation would be extended; under such circumstances he gave the note, and now he complains because he says the note was used at the very place and for the very purpose for which he knew it was required by Robinson.

POINTS.

1. The evidence presented no question requiring the submission of the case to the jury.

(*a.*) *The note was not diverted.*

The cases cited by plaintiff in error were either where the holder knew of the fraudulent diversion, as in Benjamin vs. Rogers, 126 N. Y., 70, or where the diversion of the note injuriously and prejudicially affected the accommodation maker or indorser, as in U. S. National Bank vs. Ewing, 131 N. Y., 506.

In this latter case the accommodation indorser indorsed the note upon the express assurance of the maker that it would only be used in Kentucky and not in this State.

He evidently considered that a use of the note in this State might injuriously affect his credit and financial standing and imposed the condition for his protection. The note was diverted and transferred to the plaintiff, a bank of this State, as *collateral security* for a *precedent debt*, and for that reason the plaintiff was held not to be a *bona fide* holder for value.

But, as will be hereafter seen, the Supreme Court of the United States holds under such circumstances that the bank *was* a *bona fide* holder for value.

In the present case there was no diversion, nor was anything done or attempted by which it was possible to affect the maker prejudicially.

The note effected the substantial purpose for which it was designed, in which event, even under the technical rule in New York, it could not be held a diversion.

POINTS.

1. The evidence presented no question requiring the submission of the case to the jury.

(*a.*) *The note was not diverted.*

"Where a note has effected the substantial purpose for which it was designed by the parties, an accommodation endorser cannot object that it was not effected in the precise manner contemplated at the time of its creation."

Wardell vs. Howell, 9 Wend., 174 and cases cited.
Mohawk Bank vs. Corey, 1 Hill, 513.
Powell vs. Walters, 17 Johnson, 176.
Bank of Rutland vs. Buck, 5 Wend, 66.
Daniel on Negotiable Instruments, Sec. 793.

"But where the use made of it is consistent with the object for which it may have been executed, any valid consideration will be sufficient to sustain an action upon it by the holder."

Grocers' Bank vs. Penfield, 7 Hun, 284.

Plaintiff in error cites Daniel on Negotiable Instruments, sec. 791, but does not give the language of the text, which is: "*The rule in New York* is different, and there it is held that a diversion is such fraud as to shift the burden of proof upon the holder." What is meant is that the New York rule differs from the rule laid down in the text; for in the preceding section the following proposition is laid down: "The defense must not only show that the paper was diverted from its purpose, but also that such diversion was known to the holder

POINTS.

1. The evidence presented no question requiring the submission of the case to the jury.

(*a.*) *The note was not diverted.*

when he received it, *misapplication not being such fraud* as shifts the burden of proof." Citing numerous authorities. And then in Sec. 791, after citing the more technical New York rule, the author adds: "But the principle of the text is, we think, in conformity with the current and weight of authority, and the true theory of the law merchant."

"Nor will proof that it was given for the debt of another, nor proof of mere misapplication of the instrument, where it has subserved its substantial purpose, shift the burden of proof, as has been already indicated; though in New York it is otherwise considered."

Daniel on Negotiable Instruments, Sec. 814.

The cases cited in support of the text include many decisions of the Supreme Court of the United States.

The case of Messmore vs. Meyer, 56 N. J. L., 34, has no application here, because in that case the maker gave the note to a third person named Simmons for the accommodation of Simmons and the plaintiff and took back a written receipt stating that fact.

Of course, the plaintiff was bound by the written receipt and estopped from denying the purpose for which the note was given.

POINTS.

1. The evidence presented no question requiring the submission of the case to the jury.

(*a.*) *The note was not diverted.*

If the note here were given for the accommodation of the bank, then the authority in question might apply.

At the close of the opinion in the Messmore case the true distinction is recognized by the Court: "It is unnecessary to determine what plaintiff's rights might have been, had defendants made this note for an indebtedness due from them to Simmons, or as an accommodation to Simmons alone."

The counsel for the plaintiff in error cites the case of Bradshaw vs. Miners' Bank, 81 Fed., 902, as authority to show that the circumstance of this note being made payable directly to the Elmira National Bank, instead of to Robinson and by him endorsed to the bank, permits Israel to introduce defenses not otherwise competent to him. It is not perceived how this affects the case further than to show notice to the bank, perhaps, that the note was accommodation paper. The facts in the Bradshaw case differ widely from those here. Briefly, they were that a Zinc Company had sold goods to Bradshaw, who gave therefor, at the request of the Zinc Company, notes payable to the Miners' Bank, as agent or trustee for the Zinc Company. The bank had no beneficial interest in the notes. The goods sold to Bradshaw proved not to be as represented, and it was held Bradshaw could allege this as a defence when sued on the notes. Of course, this was the same as allowing Bradshaw to defend against the fraudulent Zinc Company, whose agent was

POINTS.

1. The evidence presented no question requiring the submission of the case to the jury.

(*a.*) *The note was not diverted.*

endeavoring to enforce the notes for the benefit of the Zinc Company.

The Court goes further and says, by way of *dictum*, that the result would be the same if the Miners' Bank were the beneficial owner. Without admitting the correctness of this *dictum* it would not apply to the present case in any event.

The case of an accommodation note, as in our case, is different. The maker gives the note, not to obtain a direct benefit himself, nor necessarily for any consideration from anyone, but for the immediate purpose of giving credit to the accommodated party. He may make the note payable to the accommodated party, or he may make it payable directly to the discounting party. In neither case can the accommodated party ever enforce the note against the maker. It was never intended that he should, while in the Bradshaw case the vendor could have done so, had the notes been payable to it and the consideration good. But, of course, it is intended that the discounting party shall be able to enforce the note against the maker.

The defences available to an accommodation maker, against parties who make the original discount, do not depend upon the formal order in which the parties appear on the face of the paper. The rights of the accommodation maker, in such cases, depend upon the substance of the transaction and not upon its form. If there has been a fraudu-

POINTS.

1. The evidence presented no question requiring the submission of the case to the jury.

(*a.*) *The note was not diverted.*

lent diversion, known to the discounting party, he cannot recover of the accommodation maker, whether the note be payable to the accommodated party and by him transferred to the discounting party, or whether payable directly to the discounting party. On the other hand, if there has been no fraudulent diversion, within the legal meaning of this term, the discounting party's rights against the maker are the same, whether he took the paper directly or intermediately. When paper has been made for the purpose of accommodation, the question of what is a fraudulent diversion cannot depend on whether the discounting party is the payee or an indorsee. It is the same question always, and when answered it fixes the rights of the discounting party, no matter what his place on the instrument.

The same observations apply to the case of Vorce v. Rosenbery, 12 Neb., 448, cited in Mr. Willcox's supplemental brief at page 13. The other cases there cited are discussed elsewhere in this brief, or are irrelevant to the points herein involved.

The case of Hagan vs. Bigler, 49 Pac. Rep., 1011, also cited by plaintiff in error, has nothing to do with a case like the one at bar. The note there was delivered to a third party, in escrow, to be given to the payee on the delivery of certain property by the latter. It was given to the payee without the delivery of the property and without consideration, and in his hands was properly held unenforceable

POINTS.

1. The evidence presented no question requiring the submission of the case to the jury.

(*a.*) *The note was not diverted.*

against the maker. It is unnecessary to dwell upon the distinction between such a note and one given avowedly to obtain accommodation for the party in whose hands it was placed.

Numerous cases may be cited in support of the proposition that when an accommodation note, payable to a third party, is placed by the maker in the hands of the accommodated party, with a stipulation that it shall not be delivered until the performance of some condition, the maker is liable thereon to the payee, who in good faith and for value receives the note from the accommodated party in violation of the stipulation.

In Jordan v. Jordan, 10 Lea (Tenn.), 124, the defendant signed as a joint maker of a note, for the accommodation of one of the other makers, on condition that the note should not be used unless the signature of another person was also obtained. The accommodated party delivered the note to the innocent payee for value, in violation of this condition. The Court held the accommodation maker had no defence against the payee, saying at page 134 of the opinion:

"The learned and eminent counsel for the defendants in error thinks, he says, that it is impossible that any question of notice can arise on a negotiable instrument until it has passed out of the hands of the payee for a full consideration. But, if so, the original party to a note could never be a *bona fide* holder, and would, of course, be in a worse

POINTS.

1. The evidence presented no question requiring the submission of the case to the jury.

(*a.*) *The note was not diverted.*

situation than the obligee of an unnegotiable bond. The payee of a note, who receives it before maturity, without notice of any defect, having given for it his money, goods or credit at the time, or incurred loss or sustained some liability therefor, is a holder in due course of trade; Cherry v. Frost, 7 Lea, 1. And the suit was between the payee and the makers of negotiable securities in Passumpsic Bank v. Goss, 31 Vt., 315; Millet v. Parker, 2 Metc. (Ky.) 608; Deardorff v. Foresman, 24 Ind., 481; Smith v. Moberly, 10 B. Mon., 269. And the holder of the bill of exchange in Merritt v. Duncan, 7 Heis., 156, was the original holder, the bill being drawn payable to the drawer's own order."

To the same effect are the cases of Deardorff v. Foresman, 24 Ind., 481; Whitcomb v. Miller, 90 Ind., 384; Micklewait vs. Noel, 69 Iowa, 344; Davis v. Gray, 61 Tex., 506; Passumpsic Bank v. Goss, 31 Vt., 315; Ward v. Hackett, 30 Minn., 150; Bonner v. Nelson, 57 Ga., 433.

On facts involving the same principle the decision was the same, when the action was brought by the immediate indorsee of an accommodation indorser against the latter, (Bank of Missouri v. Phillips, 17 Mo., 29); and when the action was brought by the payee against the so-called irregular or anomalous indorser for the accommodation of the maker (Merriam v. Rockwood, 47 N. H., 81). In Gage v. Sharp, 24 Iowa, 15, the note was to be used by the accommodated party only on condition he

POINTS.

1. The evidence presented no question requiring the submission of the case to the jury.

(*a.*) *The note was not diverted.*

secured the accommodation maker by a mortgage. He delivered the note to the innocent payee for value, and the accommodation maker was not allowed to defend against the suit of the payee.

In the U. S. Supreme Court it is held that the sureties on a non-negotiable bond are liable to the innocent obligee, although the principal on the bond delivered it to the obligee in violation of a condition that it was not to be delivered until executed by other persons. Dair v. United States, 16 Wall., 1, cited with approval in Arrowsmith v. Gleason, 129 U. S., 86, 94. The case of a non-negotiable instrument is much stronger for the defendant than a case of negotiable paper like this one, and if the obligee is allowed to recover in the former case, it is submitted that the innocent payee must surely, in this case, even if it were true, which is strenuously denied, that there had been a diversion of the paper by Robinson.

POINTS.

1. The evidence presented no question requiring the submission of the case to the jury.

(b) There is no evidence that this note was used to pay the overdraft.

As we have already seen, even if the note was used with others of the same character, obtained in like manner, for the purpose of covering up an overdraft at the bank, as claimed on page 9 of the brief for the plaintiff in error, such use was not a diversion, but was fairly within the scope of the language used by Robinson to Israel at the time the note was made; but instead of there being any evidence to support that claim, the only evidence in the case is to the contrary, namely, that other notes and deposits wiped out the overdraft, and that these notes created a new cash fund which was placed to Robinson's credit in the bank, and which evidently went to pay such new items as were thereafter presented (pp. 20, 26 and 29).

In support of the claim that this note with others went to pay the overdraft, the plaintiff in error, at page 9, subdivision 5 of his summary of facts, cites the statement of Edson, the book-keeper, on page 29, to the effect that "but for the discount of said three notes, including the notes in suit, said Robinson's account at said bank would have been overdrawn May 4, 1893, about $50,000."

If those notes had not been deposited, it does not follow that there would have been any overdraft at all at the close of the day.

If no new fund had been created at the bank, the presumption is, first, that no new checks would have been drawn on the bank, and second, that in

POINTS.

1. The evidence presented no question requiring the submission of the case to the jury.

(b.) There is no evidence that this note was used to pay the overdraft.

the absence of a fund from which to pay them, such checks, if presented, would have been dishonored.

From the evidence of the book-keeper, on page 29, it appears that at the close of the day on May 4th, in addition to wiping out the overdraft of $35,000 and paying the items coming through the exchanges of $73,000, there was a balance to Robinson's credit of about $4,000; which indicates total deposits for the day of $112,000. It is evident, therefore, that if no new items had been presented for payment that day, Robinson's balance, at the close of the day, would have been about $77,000, or the full amount of these notes, $54,000 and a surplus of $23,000 in addition, after the full payment of the overdraft shown by the bank books on the morning of May 4th. There is, therefore, nothing in the evidence to sustain the statement that the proceeds of this note were diverted from any purpose to which it had been restricted, or that it was used at all for the purpose of covering up the overdraft said to exist on the morning of May 4th.

Suppose, for the sake of argument, that the note did go to pay the overdraft, there is no evidence that the money represented by the overdraft had not gone into the power house, but on the contrary the only legitimate conclusion to be drawn from the evidence is that the indebtedness was incurred in the building of that very power house. Robin-

POINTS.

1. The evidence presented no question requiring the submission of the case to the jury.

(b.) There is no evidence that this note was used to pay the overdraft.

son did not tell him that he was *going* to build or *intended* to build, but that "he *was* building a power house," and that he had *exceeded* his line of discount. On the other hand, if it went to pay new items that came through the exchanges, there is no evidence but that these items were for funds to be or that had been devoted to that very purpose.

It was incumbent upon the maker who seeks to evade responsibility, even upon his own erroneous theory of the law applicable to this case, to prove in the first instance that the proceeds of the note were diverted from the purpose for which he says the note was given, namely, to aid in the construction of the power house, but his evidence proves the contrary. The overdraft may have been, and evidently was, incurred for that very purpose. If so, it was a necessary prerequisite to the obtaining of further funds for that purpose to pay up the indebtedness already incurred. The new items that came through the exchanges may have been given in payment for material, etc., to go into that very power house, if so, the proceeds of the note were applied in direct accordance with the technical claim contended for by the plaintiff in error. The burden of proving his defense was not met by merely showing that the proceeds were paid out on new items that came through the exchanges without showing the purpose of those items.

POINTS.

1. The evidence presented no question requiring the submission of the case to the jury.

(c) At the time the bank received the note, it parted with full value therefor.

The assertion to the contrary is the result not of any deduction from the evidence, but of the desire of the plaintiff in error to support his pre-conceived theory that the note was diverted from its original purpose and applied to the payment of an antecedent indebtedness. As has been already shown, by a reference to the testimony itself, the bank parted with full value, not to the maker of the note, but to Robinson to whom the note was delivered by the maker to be used for Robinson's purposes and for his benefit.

The counsel in his brief (p. 10) characterizes the discounting of the note as a "mere book-keeping transaction," although the testimony is undisputed that the bank parted with the full sum represented by the notes in cash at the time they were taken.

The giving of a $17,000 note to his friend to enable him to secure further accommodations at the bank, may have been a mere matter of form to the irresponsible maker, but to the bank that was victimized it was an exceedingly serious transaction.

It is true Robinson did not take the proceeds of the notes in currency out of the bank at the moment of discount and cart them away; they were merely placed to his credit in the usual manner and a new cash fund created to be drawn upon as occasion might require.

POINTS.

1. The evidence presented no question requiring the submission of the case to the jury.

(*c.*) *At the time the bank received the note, it parted with full value therefor.*

But even if applied in payment of the overdraft or as additional security therefor, under the decisions of this Court, the bank would, nevertheless, be a holder for value.

Such a vast number of cases have been cited by the plaintiff in error, that time cannot be taken here to notice each one in detail. Every case cited has been examined. Many of them are wholly irrelevant upon any theory. Others are applicable to a particular state of facts not existing here. While others hold propositions at variance with the rules of law, long settled by this Court.

The New York cases seem to hold that where an accommodation note is fraudulently obtained or diverted and pledged as collateral security for a pre-existing indebtedness, the pledgee is not such a holder for value as to be entitled to recover. And a great number of cases are cited to sustain this proposition.

Now, upon the plaintiff in error's own theory, this note was either applied to the payment of a pre-existing indebtedness, or put up as additional security therefor.

If applied in payment of the indebtedness, then even under the New York cases the bank is entitled to recover.

In Phœnix Ins. Co. vs. Church, 81 N. Y., 225, after exhaustively collating the authorities on that point, the Court concludes as follows:

POINTS.

1. The evidence presented no question requiring the submission of the case to the jury.

(c.) At the time the bank received the note, it parted with full value therefor.

"In view of this long line of authorities it must be regarded as the settled doctrine in this State that the surrender by a creditor of the past due notes of a debtor, upon receiving from him, in good faith, before maturity, the note of a third person, in place of the note surrendered, constitutes the creditor a holder for value of the notes thus taken, and protects him against the defenses and equities of the antecedent parties, and that it is immaterial whether the note surrendered was given to the creditor for goods sold, or money loaned, or under circumstances which would leave the original debt represented by the note in existence, enforceable against the debtor, or whether by surrendering the note, the creditor parted with his entire right of action."

And in the later case of Mayer vs. Heidelbach, 123 N. Y., 339, the Court, in discussing the case of Coddington vs. Bay (5 Johns., 57; 20 id., 637), which originated the difference between the courts of New York State and the concurring views of the Federal Courts and those of England, the opinion says:

"While it was in that case ruled that the transfer of negotiable paper as collateral security merely for an antecedent debt did not make the creditor a holder for value within the rule cutting off prior equities, it was yet asserted that such result followed where, among other things, some existing

POINTS.

1. The evidence presented no question requiring the submission of the case to the jury.

(c.) At the time the bank received the note, it parted with full value therefor.

debt was satisfied thereby. And that, I think, was a natural and logical conclusion from the reasoning upon which the decision rested * * * And so we have steadily decided."

Citing numerous cases.

But without going to unnecessary length in the discussion of the hair-line distinctions to be found in some of the New York cases, suffice it to say, that this case, having been brought in the Federal Court, is to be decided in accordance with the Federal decisions.

In the case of Swift vs. Tyson, 16 Peters, page 1, in which the Supreme Court of the United States discusses the case of Coddington vs. Bay, 20 Johns., 637, in which the difference between the courts of New York and the Federal Courts originated, on the subject of what constituted a holder for value, the Court, discussing the claim that under the 34th section of the Judiciary Act it was incumbent upon the Federal tribunal to decide controversies arising out of New York contracts in accordance with New York decisions, the Court says, at page 19: "And we have not now the slightest difficulty in holding that this section upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and

POINTS.

1. The evidence presented no question requiring the submission of the case to the jury.

(c.) At the time the bank received the note, it parted with full value therefor.

effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence * * * It becomes necessary for us, therefore, upon the present occasion, to express our own opinion of the true result of the commercial law upon the question now before us. And we have no hesitation in saying that a pre-existing debt does constitute a valuable consideration in the sense of the general rule already stated, as applicable to negotiable instruments. * * * * * We are prepared to say, that in receiving it in payment of, or as security for a pre-existing debt, is according to the known usual course of trade and business. * * * But establish the opposite conclusion; * * * what, indeed, upon such a doctrine, would become of that large class of cases, where new notes are given by the same or by other parties, by way of renewal or security to banks, in lieu of old securities discounted by them, which have arrived at maturity ? * * * The doctrine would strike a fatal blow at all discounts of negotiable securities for pre-existing debts."

In Railroad Company vs. National Bank, 102 U. S., page 14, the doctrine laid down in Swift vs. Tyson, is reaffirmed in a very instructive opinion.

In the syllabus of the case the following propositions are laid down:

"The transfer by indorsement to a creditor of

POINTS.

1. The evidence presented no question requiring the submission of the case to the jury.

(c.) At the time the bank received the note, it parted with full value therefore.

negotiable paper before maturity, merely as security for an antecedent debt, although it is without his express agreement for indulgence, is not an improper use of such paper, and is as much in the usual course of commercial business as its transfer in payment of the debt. In neither case is the *bona fide* holder affected by equities or defences between prior parties of which he had no notice.

"The Courts of the United States are not controlled by the decisions of State courts on questions of general commercial law. Swift vs. Tyson (16 Pet. 1) and Oates vs. National Bank (100 U. S. 239) reaffirmed."

After discussing the New York cases and laying down numerous propositions concerning which there is no conflict, the Court says at page 26:

"Upon these propositions there seems at this day to be no substantial conflict of authority. But there is such conflict where the note is transferred as collateral security *merely*, without other circumstances, for a debt previously created. One of the grounds upon which some courts of high authority refuse, in such cases, to apply the rule announced in Swift vs. Tyson is, that transactions of that kind are not in the usual and ordinary course of commercial dealings. But this objection is not sustained by the recognized usages of the commercial world, nor, as we think, by sound reason."

See also the recent cases of Doe vs. Northwestern Coal and Transportation Company, 78 Fed. 62.

Greenway vs. U. D. Orthwein Grain Co., 85 Fed. 536.

POINTS.

1. The evidence presented no question requiring the submission of the case to the jury.

(d) The note was discounted in good faith and in the usual course of business.

At the time the notes were presented the cashier inquired of Col. Robinson as to the responsibility of the makers, and was assured by him that they were able to pay the notes (p. 20).

A letter was shown him by Robinson at the time which created this same impression (p. 21).

On page 25, the cashier says, "I believed the makers would pay them."

And this belief will not be thought unnatural when it is remembered that at that time Robinson was believed by every one to be a man of great wealth and of spotless character, to whom a mean act or a false representation would be an absolute impossibility.

It is strongly urged as an evidence of bad faith that previous to the time the bank took the notes, Robinson had procured to be discounted at the bank about $300,000 of other paper made by other parties, and that there had been discounted for the benefit of members of the cashier's family paper to the amount of about $107,000 (see brief, page 10, subdivision 10, and page 36.)

One of the purposes of banks of discount is to discount paper, and in the absence of any evidence that there was a dollar of bad paper in the $300,000 of previous paper offered for discount by Robinson, or the $107,000 of paper alleged to have been discounted, not for Bush, but for members of his family, there was nothing before the jury from

POINTS.

1. The evidence presented no question requiring the submission of the case to the jury.

(d.) The note was discounted in good faith and in the usual course of business.

which they would be permitted to find the slightest suspicion of impropriety concerning that previous paper. The mere fact that that paper had been previously discounted in the regular course of business was no evidence of bad faith or collusion or improper conduct on the part of any one in connection with subsequent discounts.

There is not a word anywhere in the evidence reflecting on that paper upon which the jury could base a finding that a single dollar of it was worthless or uncollectible. Every dollar of it may have been gilt edged, and in the absence of any evidence to impeach it, the jury would not be prevented from saying that because the present paper turned out to be worthless, undoubtedly the previous paper must have also been worthless, and then after reasoning backwards in that way and arriving at that conclusion, convert the conclusion into a premise and say that the fact that the previous paper was worthless and collusive, was evidence to show that the discounting of the subsequent paper was also in bad faith and collusive.

It will be remembered that all the witnesses in the case were called by the plaintiff in error, but he insists that he has the right to have the jury disregard the testimony and find a lack of *bona fides*, not only without evidence, but in contradiction of the affirmative testimony of his own witnesses; and in support of this extraordinary proposition he

POINTS.

1. The evidence presented no question requiring the submission of the case to the jury.

(d.) The note was discounted in good faith and in the usual course of business.

cites the Diefendorf cases, and others to be found on page 19 of his brief.

In each of those cases the witness called, whose credibility was held to be a question for the jury, was either the plaintiff himself, or some person directly interested in the result, *called by the plaintiff*, and fraud in the inception of the note having been shown, the court held that the credibility of the interested witness was for the jury to determine. But there is no authority for the proposition that he has a right to have the jury pass upon the credibility of his own witnesses, and find in opposition to their undisputed testimony. It is a novel proposition that if witnesses called by a party fail to testify as desired, he can then insist that the jury may disregard their evidence and render a verdict in opposition thereto. The effect of his claim is that his right to submit the case to the jury grows stronger as the proofs submitted by himself grow weaker, leaving him in a better position by calling witnesses from whom no favorable testimony could be elicited than if no witness had been called at all.

Where a party calls a witness, he has no right to have his evidence submitted to the jury for the purpose of affecting his credibility where it is uncontradicted and unimpeached.

In the case of American Exchange Nat. Bank vs. N. Y. Belting, etc., Co., 148 N. Y., 704, the Court

POINTS.

1. The evidence presented no question requiring the submission of the case to the jury.

(*d.*) *The note was discounted in good faith and in the usual course of business.*

says: "Nor do we think that Corey's credibility as a witness should have been passed upon by the jury. He was called as a witness by the defendant. * * * If the defendant relied upon his evidence to defeat the plaintiff's right to recover, by showing a wrongful diversion of the notes, it surely was competent for the plaintiff, out of the mouth of the same witness, to show the nature of the transaction," etc.

(e) The bank did not know but that full consideration had passed from Robinson to the maker of the note.

When Robinson, a rich and reputable man, well known and of the highest standing, came with a note made directly to the bank by a maker not indebted to the bank, the presumption would naturally be that some consideration must have passed before the maker parted with its possession.

There was nothing in the circumstances that would require the bank ro make inquiry as to the original consideration. There was nothing unusual about it, and the bank would have the right to assume that a consideration had passed.

"A bank has a right to assume, as to notes offered to it, whether for discount or as collateral security, by a customer who has an account with it and who is in the habit of borrowing money from it, that the customer is acting in good faith and within his lawful rights; and the fact that the cus-

POINTS.

1. The evidence presented no question requiring the submission of the case to the jury.

(e.) The bank did not know but that full consideration had passed from Robinson to the maker of the note.

tomer is engaged in the business of note-brokerage is not enough to deprive the bank of the right to indulge in such assumption."

Am. Ex. Nat. Bank vs. N. Y. Belting, etc,, Co., 148 N. Y., 698.

See also Doe vs. Northwestern Coal and Transportation Co., 78 Fed., 62.

If Robinson had been a man who was not known to be engaged in large transactions, or was known to be without financial standing, or of doubtful reputation, or offered to dispose of the paper at an inadequate price, a different question might arise to which some of the authorities cited by the counsel for the plaintiff in error might have some application.

But absolutely no fact appears that would put the bank upon its inquiry.

The contention of the plaintiff in error upon this point seems to be that Robinson controlled the policy of the bank, and that his knowledge was therefore the knowledge of the bank, a contention, however, which finds no support in the evidence as an examination will at once reveal.

In support of this statement the testimony of Jackson Richardson, the President of the bank, is relied on. Being president of the bank it was his duty, of course, to know something about its affairs, but his testimony reveals that

POINTS.

1. The evidence presented no question requiring the submission of the case to the jury.

(e.) The bank did not know but that full consideration had passed from Robinson to the maker of the note.

he didn't pretend to know anything definitely, but evidently regarded himself as the merest figure-head. On page 16, he says: "My absences during the period I held the office of president were from one week to three months. In all, half of my time was spent away from Elmira; six months in Elmira and six months out of Elmira. Every day while I was in town and my health was proper, I managed the business of the bank the same as I managed my own business." And then at folio 85 he artlessly describes how he managed his own business: "I did not look over at all the individual notes which have been discounted at the bank. There was a committee for that business. And then I would talk with the committee. *I manage my own personal business that way. I ask my partner what notes he has and how they stand. I never look at them; don't know whether I have a note or not,*" and at the bottom of page 12: "The details I did not look after much myself; I wasn't there to do it; I didn't have my health to do it; I looked that over just as I did my own business; took a general survey." He says he had no knowledge of these notes (p. 15), because he was absent from the city at the time. "I went to New York the first of May and came back the 19th of May" (p. 16).

In support of the proposition that Robinson controlled the policy of the bank, pages 12 and 13 are

POINTS.

1. The evidence presented no question requiring the submission of the case to the jury.

(e.) The bank did not know but that full consideration had passed from Robinson to the maker of the note.

first cited, where it is undoubtedly intended to call attention to the following:

"Q. Who were the active members of the directory; the men who had the most to say about the business of the bank?

"A. Col. D. C. Robinson was the man. Mr. Bush, of course, he was cashier; he was a director also."

He, of course, was anxious to relieve himself by blaming some one else, and so on page 13, he continues: "Q. What members of your board, if some more than others controlled the policy of the bank? A. I think Mr. Robinson controlled."

But on the same pages, in answer to the counsel for the defendant below whose witness he was, he says: "Q. When you say that Col. Robinson and Mr. Bush were the most active of the directors, how did they display their activity? A. *By showing the standing of the bank, that is, especially Mr. Bush,* and giving us a statement of how the bank was working.

"Q. *Was there any part of the business which was deputed to Col. Robinson, or of which he took principal charge?* A. *No, I think not.*

"Q. Do you remember whether he was on any committees with the directors? A. My impression is he was not. Q. Then why do you say he was one of the most active of the directors? A.

POINTS.

1. The evidence presented no question requiring the submission of the case to the jury.

(e.) The bank did not know but that full consideration had passed from Robinson to the maker of the note.

Well, he and Mr. Bush consulted together as much perhaps, more than others.

"Q. How do you know they consulted together?

"A. Well, sir, *I don't know it, only what I hear talked by other parties in the bank.*

"Q. *Did you see them in consultation?* A. *No, sir; I might say right here, most of the time I was out of the City, I was not here looking very much of the time myself.*"

On page 13 this witness further says: "Col. Robinson did not ask me to discount paper for him. I *suppose* he asked Mr. Bush. Such discounts as Col. Robinson obtained either for himself personally, or for the company of which he was president, were obtained through Mr. Bush, the cashier."

And then he adds, speaking of Bush: "I suppose he followed the directions of the directors, not of Col. Robinson" (p. 14).

And on page 16: "Col. Robinson usually obtained discounts through Mr. Bush and the finance committee."

In the last line on page 17 and top of page 18: "I suppose that all those notes were submitted to the finance committee."

And then he tries to say that since the bank's failure it looks as if paper might have been dis-

POINTS.

1. The evidence presented no question requiring the submission of the case to the jury.

(e.) The bank did not know but that full consideration had passed from Robinson to the maker of the note.

counted that was not submitted to the finance committee. He doesn't know a thing about it, frankly admits that he doesn't, can't show a single fact showing any control by Robinson, nor a single instance where Robinson procured any paper to be discounted without the knowledge of the finance committee or in opposition to their wishes. And yet from the loose statements of this witness, without a single fact to support the claim, it is seriously contended that Robinson controlled the bank and practically was the bank. This witness does not pretend to show a direction at any time on any subject given by Robinson to Mr. Bush or anyone connected with it in regard to any matter connected with the bank's policy or business.

But even if Bush did discount paper on his own account without consulting the finance committee, whatever else it may indicate it does not show that Robinson controlled the policy of the bank.

Robinson in this transaction was acting exclusively for himself and in his own interests and not for the bank, and under such circumstances the fact that he was a director does not make his knowledge the knowledge of the bank nor make his action the action of the bank.

In Mayor vs. Tenth National Bank, 111 N. Y., 446, the Court on page 457 says:

"But it is claimed that knowledge of the conspiracy and fraud must be imputed to the bank,

POINTS.

1. The evidence presented no question requiring the submission of the case to the jury.

(e.) The bank did not know but that full consideration had passed from Robinson to the maker of the note.

because three of the conspirators, Ingersoll, Tweed and Connolly were directors of the bank, and hence that the bank could not claim the benefit of good faith. But none of these directors represented the bank in these transactions and in no way acted for the bank in them. Connolly was consulted as comptroller, and Ingersoll acted for the commissioners. Neither of them was present at any meeting of the directors when any action was taken in reference to the advances. * * * * The knowledge these conspirators had while engaged in their fraud for their own benefit could not, therefore, be attributed to the bank; and to this effect are all the decisions."

Citing numerous cases.

"The fact that a director of a corporation, the payee of the note was also president of the bank and that he received the note from the payee, to be offered to the bank for discount, is not sufficient; he is under no obligation in such case to state to the board of directors of the bank his opinion as to the liability of the parties appearing as makers upon the note."

Merchants Nat. Bank vs. Clark, 139 N. Y., 314.

It seems to be assumed by the defendant below that because Robinson stated to him at the time he

POINTS.

1. The evidence presented no question requiring the submission of the case to the jury.

(e.) The bank did not know but that full consideration had passed from Robinson to the maker of the note.

made the note that he would not be called upon to pay it, that that is a defense.

"It was his theory and his testimony that the cashier and the teller of the bank requested him to permit them to use his name in stock speculations, and stated that they desired his name on notes which would be discounted by the bank for that purpose, for the reason that their names onght not to appear in that way by reason of their official relations with the bank, and that they agreed that the bank would take care of the notes as they became due. * * * Conceding his testimony to be true, and that he expected the officers of the bank to take care of his notes as they became due, and that they were given for the purpose of raising money as he states, yet that was no defense for him against the notes in the hands of the bank. Having made the paper, he was under obligation to pay it."

Mead vs. National Bank, 89 Hun, 103, 4, 5.

First Nat. Bank of Whitehall vs. Tisdale, 18 Hun, 151.

POINTS.

II.

The verdict was properly directed for the plaintiff below and the judgment entered thereon should be affirmed with costs.

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